STATE OF MICHIGAN
IN THE SUPREME COURT

STEVE MARTINKO, an individual; MICHAEL LACKOMAR, an individual; WENDY LACKOMAR, an individual; MARK GARMO, an individual; and STEVE HUDENKO, an individual,

Plaintiffs-Appellants,

v

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan; DANIEL EICHINGER, in his official capacity as Director of the Michigan Department of Natural Resources; and DANA NESSEL, in her official capacity as the Attorney General for the State of Michigan,

Defendants-Appellees.

Supreme Court No. _____

Court of Appeals No. 353604

Court of Claims Case No. 20-000062-MM

Hon. Christopher M. Murray

_____/

HELM LAW PC
David C. Helm (P75022)
Attorney for Plaintiffs-Appellants
598 N. Mill Street
Plymouth, MI 48170
248.679.8804
david@HelmLawPC.com

Joseph T. Froehlich (P71887)
Joshua Booth (P53847)
Robert Reichel (P31878)
Kyla Barranco (P81082)
Assistant Attorneys General
Attorney for Defendants-Appellees
State Operations Division
P.O. Box 30754
Lansing, MI 48909
517.335.7573
froehlichj1@michigan.gov
boothj2@michigan.gov
reichelb@michigan.gov
barrancok@michigan.gov

_____/

PLAINTIFFS-APPELLANTS'
EMERGENCY BYPASS APPLICATION FOR INTERLOCUTORY APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

TABLE OF CONTENTS

INDEX OF EXHIBITS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ORDER APPEALED FROM AND RELIEF SOUGHT

Plaintiffs-Appellants seek Emergency leave for bypass appeal from the Court of Claims' April 29, 2020 Opinion and Order Regarding Plaintiffs-Appellants' April 23, 2020 Motion for A Preliminary Injunction. The trial court's order is attached as **Exhibit 1**.

The trial court's register of actions is attached as **Exhibit 2**. There were no oral arguments, the decision having been made on pleadings and briefs alone, therefore there are no transcripts to order or present.

The Court of Appeals register of actions is attached as **Exhibit 3**.

Plaintiffs-Appellants seek leave for immediate interlocutory consideration and a reversal and remand to the trial court with instructions to enter a preliminary injunction.

STATEMENT OF JURISDICTION

The Court of Claims entered its Opinion and Order Regarding Plaintiffs-Appellants' April 23, 2020 Motion for a Preliminary Injunction on April 29, 2020. Plaintiffs-Appellants' emergency application for interlocutory appeal was filed on May 14, 2020 with the Court of Appeals. This bypass application for leave to appeal was filed within 42 days of the application for leave to appeal and before the Court of Appeals decision. This Court therefore has jurisdiction to consider the application pursuant to MCR 7.305.

STATEMENT OF QUESTIONS INVOLVED

I. Did the Trial Court Commit Clear Error and Abuse Its Discretion When It Denied Plaintiffs-Appellants' Motion for a Preliminary Injunction?

Plaintiffs-Appellants Say, "Yes."
Defendants-Appellees Say, "No."

II. Did The Trial Court Commit Clear Error And Abuse Its Discretion When It Determined That The Right To Intrastate Travel Is A Lessor Right?

Plaintiffs-Appellants Say, "Yes."
Defendants-Appellees Say, "No."

III. Did The Trial Court Commit Clear Error And Abuse Its Discretion When It Failed To Apply Strict Scrutiny When Analyzing The Executive Orders?

Plaintiffs-Appellants Say, "Yes."
Defendants-Appellees Say, "No."

IV. When Applying The Strict Scrutiny Standard To The Executive Orders, Are Plaintiffs-Appellants Likely To Succeed On Their Merits?

Plaintiffs-Appellants Say, "Yes."
Defendants-Appellees Say, "No."

V. Did The Trial Court Commit Clear Error And Abuse Its Discretion When It Determined That There Would Be Harm To The Public Interest If The Preliminary Injunction Was Granted?

Plaintiffs-Appellants Say, "Yes."
Defendants-Appellees Say, "No."

VI. Did The Trial Court Commit Clear Error And Abuse Its Discretion When It Determined That The Emergency Management Act Was Constitutional And Did Not Grant Uncontrolled And Arbitrary Power To The Administration And Therefore Plaintiffs-Appellants Were Not Likely To Succeed On Their Merits?

Plaintiffs-Appellants Say, "Yes."
Defendants-Appellees Say, "No."

STATEMENT OF FACTS

In response to COVID-19, on March 10, 2020, under the authority of the Emergency Management Act, Governor Whitmer proclaimed the existence of a state of emergency throughout the State of Michigan. (Executive Order 2020-4). Since March 10, 2020, Governor Whitmer has issued no less than 81[1] separate executive orders in response to COVID-19. Executive Order 2020-21 ((2020-21) attached as **Exhibit 4**) took effect on March 24, 2020 and restricts all residents from countless activities and ordered all business close with limited exception. Order 2020-21 remained in effect originally until April 9, 2020 when it was subsequently rescinded and replaced by Executive Order 2020-42. Executive Order 2020-42 ((2020-42) attached as **Exhibit 5**) took effect on April 9, 2020 and extended the timeline originally set by 2020-21 and grossly expanded its restrictions on businesses' and individuals' fundamental rights going so far as to restrict recreational activities to only those physical in nature, preventing individuals from accessing their second homes, and under DNR rules promulgated under the order, prevents traveling distances to access public lands and waterways and utilizing motorized boats, just to name a few.

In the intervening time between the filing of Plaintiffs-Appellants' (hereinafter "Plaintiffs") complaint and this appeal, Governor Whitmer issued two more executive Orders which are in the same spirit of 2020-21 and 2020-41 but change some of the restrictions slightly. Executive Order 2020-59 (2020-59) (**Exhibit 6**) was signed on April 24, 2020 and rescinded 2020-42 however it still maintains the blanket stay-at-home provision and under the DNR interpretation still limits the distance one may travel to access public lands and waterways (see **Exhibit 6** at page 3).

[1] 51 executive orders were issued at the time of filing the underlying complaint, but an additional 22 executive orders had been signed by the time this appeal is filed.

On May 1, 2020, Governor Whitmer signed Executive Order 2020-70 (2020-70) attached as **Exhibit 7**, which rescinded 2020-59 and but for allowing certain business to reopen, maintains all the restrictions contained in 2020-59. Although the Executive Orders are coming and going, Plaintiffs Complaint focuses on the stay-at-home Executive Orders which are identical and continue to be extended.

PROCEDURAL HISTORY

On April 22, 2020, Plaintiffs filed a verified Complaint in the Court of Claims against the Defendants-Appellees (hereinafter "Defendants") alleging that two of Governor Whitmer's executive orders, Executive Orders 2020-21 and 2020-42 (and now Executive Order 2020-59 as it contains many of the same restrictions as the prior two orders) infringe on their constitutional rights to procedural and substantive due process. (**Exhibit 8, Verified Complaint**). Specifically, plaintiffs' verified complaint alleges that the "mandatory quarantine" imposed by the Executive Orders violate their right to both procedural due process (Count I) and substantive due process (Count II), and that the intrastate travel restrictions contained in executive order 2020-42 also violate their rights to procedural due process (Count III) and substantive due process (Count IV). The Plaintiffs further allege that the Emergency Management Act, MCL 30.401 *et seq*., is an unconstitutional delegation of legislative power to the Governor (Count V).

In their complaint, the Plaintiffs sought a temporary restraining order, a preliminary injunction, and a declaratory judgment holding the Governor's actions and the Emergency Management Act are unconstitutional (see **Exhibit 9, Plaintiffs' Motion for an Ex Parte Temporary Restraining Order, Show Cause Order, And Preliminary Injunction**).

The Trial Court denied the temporary restraining order but granted the show cause request and compelled the Defendants to show cause why a preliminary injunction should not be granted.

(**Exhibit 10, April 23, 2020 Order**). The Defendants were given until Monday, April 27, 2020 to file a Response to Plaintiffs' Motion and did file a Response on April 27, 2020. (See **Exhibit 11, Defendants' Response**). In their Response, the Defendants contend that because COVID-19 is new and deadly to some people, that all necessary measures must be taken to prevent the spread.

The Plaintiffs' filed a Reply to Defendants' Response on April 29, 2020. (See **Exhibit 12, Plaintiffs' Reply**). In their Reply, as well as in their Complaint and Motion, the Plaintiffs point out that when the government has had to deal with health issues in the past, the courts have always required some level of reasonable suspicion and procedural due process prior to taking any action which would restrict or suspend an individual's fundamental rights and regardless of the procedural requirements, if a less restrictive means was available to achieve the same governmental means, the court must hold the broader more restrictive means unconstitutional.

On April 29, 2020, the Trial Court issued its Opinion and Order denying Plaintiffs' Preliminary Injunction. (See **Exhibit 1, April 29, 2020 Opinion and Order**). It is this order which Plaintiffs now file their interlocutory appeal.

By way of explaining further procedural history, on May 1, 2020, Defendants filed a Motion for Summary Disposition based on the same arguments they made in their response to Plaintiffs' Preliminary Injunction Motion and rely substantially on the trial court's April 29, 2020 Opinion and Order (See **Exhibit 13, Defendants' Summary Motion**). And on Thursday May 14, 2020, Plaintiffs filed a Motion to Stay Proceedings in the Court of Claims pending this interlocutory appeal. (See **Exhibit 14, Motion to Stay**). On May 14, 2020, the Court of Claims granted Plaintiffs' Motion to Stay. (See **Exhibit 15, May 14, 2020 Order**). Further, On May 14, 2020, Plaintiffs filed an Emergency Application for Interlocutory Appeal with the Court of Appeals. (See **Exhibit 3**). There has been no decision made by the Court of Appeals.

ARGUMENT

As fears of COVID-19 sweep the nation, several governors are instituting quarantine and other restrictive policies based on fear. These appear to reflect political agendas and responding to the public's clamoring for greater protection, expressed as an over-abundance of caution. But the rule of law stands precisely to prevent the state from depriving individuals of liberty based on irrational or exaggerated public fear. Plaintiffs agree that the state has the ability to take action to address public health concerns, *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 818 (1995), however, there is a limit to the government's action. Legal standards on the state's police powers to protect the public's health and safety are well developed and notwithstanding their stated public purpose, Governor Whitmer's state-wide orders violate the Plaintiffs' Procedural Due Process Rights and Substantive Due Process Rights protected by both the Federal and State Constitution. These Executive Orders afford no process to challenge the involuntary quarantine and other restrictions and are not so narrowly tailored to effect the government's goals without unnecessarily infringing on Plaintiff's fundamental rights.

Standard of Review

A review of a trial court's decision to deny injunctive relief is abuse of discretion. *Thermatool Corp v Borzym*, 227 Mich App 366, 372; 575 NW2d 334 (1998). The exercise of this discretion may not be arbitrary, but rather must be in accordance with the fixed principles of equity jurisdiction and the evidence in the case. *Davis v Detroit Fin Review Team*, 296 Mich App 568, 612; 821 NW2d 896 (2012). An abuse of discretion exists when the decision is outside the range of principled outcomes, *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008), and it may arise from the trial court's misunderstanding of controlling legal principles, *Davis,* 296 Mich App at 612-613.

This case also presents questions of law regarding statutory interpretation and the application of our state Constitution, which is reviewed de novo. *In re Sanders*, 495 Mich 394, 404; 852 NWd2 524 (2014). See also *Mayor of Cadillac v. Blackburn*, 306 Mich. App. 512, 516, 857 N.W.2d 529, 532 (2014).

I. Did the Trial Court Commit Clear Error and Abuse Its Discretion When It Denied Plaintiffs Motion for a Preliminary Injunction?

Plaintiffs-Appellants Say, "Yes."
Defendants-Appellees Say, "No."

Legal Analysis of a Motion for Preliminary Injunction

When considering a motion for preliminary injunction, the trial court must consider four factors, "(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued." *Davis*, 296 Mich App at 613, quoting *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 660-661; 588 NW2d 133 (1998).

The trial court denied Plaintiffs' Preliminary Injunction because it determined that Plaintiffs had not shown a substantial likelihood of success on the merits, (**Exhibit 1** at page 15) and that the public will be more harmed by imposing a preliminary injunction than by denying it (**Id.** at page 17).

On the issue of the merit, the court made several clear errors and misinterpreted established law and precedents which warrant review and remand. Specifically, the trial court errored when it failed to recognize Plaintiffs' right to intrastate travel as a fundamental right and failed to apply

strict scrutiny when analyzing a restriction on that right. The trial court also errored when it determined that the public would be harmed by imposing a preliminary injunction and that the Emergency Management Act was constitutional. For those reasons as further discussed below, an emergency review and remand with instruction to enter the preliminary injunction is warranted.

II. Did The Trial Court Commit Clear Error And Abuse Its Discretion When It Determined That The Right To Intrastate Travel Is A Lessor Right?

Plaintiffs-Appellants Say, "Yes."
Defendants-Appellees Say, "No."

In its April 29, 2020 Opinion and Order, the trial court begins its analysis of the issues of Plaintiffs' merits by determining that the right to intrastate travel is not a fundamental right. The Trial Court in its opinion compares the right to intrastate travel with those espoused by the Declaration of Independence:

> At and before our founding, our forefathers fought for the inalienable right to own property, freely engage in commerce, represent ourselves through our own elected representatives, worship where and how we wanted, etc. The Declaration of Independence's list of grievances against the King of England prove as much, as do several of the amendments to the United States Constitution, and in particular, the Fifth and Fourteenth Amendments.
>
> Today we have all the freedoms and liberties that the founders fought for, and our branches of government exist in large part to ensure that those rights remain intact… The liberty and freedoms at stake in this matter do not in large part involve those rights and liberties the founders fought so hard for; instead, plaintiffs focus on the right to freely move about one's community and state, to do commerce when one pleases, and to travel about the state for vacation purposes. It is the restrictions to those activities within EO 2020-59 that plaintiffs challenge here. (**Id.** at pages 5 and 6).

This is a startling conclusion. Our founders also set forth in the Declaration of Independence that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty

and the pursuit of Happiness." Those rights encompass every other specific right and its patently absurd to say that in fighting for "liberty and the pursuit of happiness" the founders would not have considered the right to leave their homes and go where and when they choose with whomever they choose.

Further, the trial court failed to look to the Michigan Constitution of 1963 or any of the cases cited by Plaintiffs which clearly state that the right to intrastate travel is a fundamental right on par with the right to interstate travel under the US Constitution and any restriction on such a right should be subject to strict scrutiny. The right to interstate travel is a fundamental freedom, *Shapiro v. Thompson*, 394 U.S. 618 (1969) and one recognized under the Michigan Constitution. *Pencak v. Concealed Weapon Licensing Bd.*, 872 F. Supp. 410, 414 (1994). The analysis of government burdens on intrastate travel under the Michigan Constitution is identical to the analysis applied to government burdens on interstate travel under the United States Constitution. *Pencak v. Concealed Weapon Licensing Bd.*, 872 F. Supp. 410, 414 (1994) citing *Musto v. Redford Township*, 137 Mich. App. 30, 34, 357 N.W.2d 791 (1984). Further, a state law implicates the right to travel when it deters travel and when impeding travel is its primary objective. *Barrow v. City of Detroit Election Comm'n*, 301 Mich. App. 404, 422, 836 N.W.2d 498, 509 (2013) citing *Attorney General of New York v Soto-Lopez*, 476 U.S. 898, 903 (1986).

Under Governor Whitmer's Executive Orders, among other restrictions, essentially every resident in the State of Michigan is placed under quarantine in their homes and restricted from engaging in any activity not expressly authorized. That is the very definition of a state action where the primary objective is to impede travel.

Under these precedents, the right to intrastate travel must be viewed as a fundamental right. Since it was not held that way by the Trial Court, a review and remand with instruction to reevaluate Plaintiffs' Motion for Preliminary Injunction is warranted.

III. Did The Trial Court Commit Clear Error And Abuse Its Discretion When It Failed To Apply Strict Scrutiny When Analyzing The Executive Orders?

Plaintiffs-Appellants Say, "Yes."
Defendants-Appellees Say, "No."

After failing to recognize the right to intrastate travel as a fundamental right, the court chose to use the rational-basis review[2] for the remainder of its opinion. This was in clear error. The trial court stated in its opinion that the constitutionally protected rights are subject to a balancing test and are therefore equal to the state's interest in protecting the public health. (**Exhibit 1** at page 7). The court made this "balance" determination based on its interpretation of *New Rider v. Board of Ed. Of Independent School Dist No 1*, 480 F2d 693 (CA 10, 1973). However, the court's reliance on *New Rider* is completely misplaced. In that case, the court was dealing with the right of a minor child to not abide by a school's dress code and a challenge to the school's authority to impose such restrictions under the first Amendment. What the trial court failed to recognize is that it is well established that a minor within a public school has reduced constitutional rights when compared to an adult citizen in society. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986) (Holding that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings). The approach therefore taken in *New Rider* is not indicative of the approach which should be taken here.

The court in *Musto* looked to several cases involving the right to travel and concluded that the right to travel is classified as a fundamental right protected by the Michigan Constitution of

[2] Although the trial court does not come out and say that it is using the rational-basis test, it is obvious from its language and analysis.

1963 and that any statute which imposes a penalty on the exercise of this right must be viewed with strict scrutiny. *Musto v. Redford Township*, 137 Mich. App. 30, 34, 357 N.W.2d 791, 793 (1984). Because the right to intrastate travel is fundamental and the Executive Order is clearly a restriction on that right and specifically one intending to restrict that right, Strict Scrutiny must be applied. Since the trial court did not apply strict scrutiny, a review and remand with instruction to apply strict scrutiny to the court's analysis of Plaintiff's Motion for Preliminary Injunction is warranted.

IV. When Applying The Strict Scrutiny Standard To The Executive Orders, Are Plaintiffs Likely To Succeed On Their Merits?

Plaintiffs-Appellants Say, "Yes."
Defendants-Appellees Say, "No."

As stated above, the restriction on Plaintiffs' fundamental right to travel freely throughout the state is subject to a strict scrutiny analysis.

> A burden on a suspect class or fundamental right must promote a compelling interest by the least burdensome means. Strict scrutiny is the standard of judicial review of any law that potentially either violates equal protection of the laws because the law creates a burden on a suspect class or infringes on a fundamental individual right. Strict scrutiny requires the court to examine the purpose for which the law in fact was adopted or enforced to determine whether the law promoted a compelling governmental purpose. If it does, the court must then examine the means chosen to implement the law to determine that the law is narrowly tailored to promote the compelling governmental purpose by the means that least burdens the interest (for a fundamental right protected by due process) or the class (for equal protection) from among all means possible to promote the compelling governmental purpose. *Bouvier Law Dictionary.*

The strict scrutiny standard requires the state to prove that its actions are justified by a compelling interest and that there are no less drastic means to achieve that interest. *Porth v. Roman Catholic Diocese*, 209 Mich. App. 630, 642, 532 N.W.2d 195, 201 (1995).

Although the states undoubtedly have the authority to issue quarantine orders, the Supreme Court has set clear standards for civil confinement or commitment, recognizing that quarantines implicate fundamental liberty interests. The Supreme Court has primarily examined constitutional standards for civil commitment of persons with mental illness. Lower courts have applied constitutional standards for civil commitment to other forms of civil confinement, notably quarantines. See, e.g., *Best v. St. Vincents Hosp.*, 2003 U.S. Dist LEXIS 11354 (2003) (overturned in part on other grounds) (**Exhibit 16**). See also *Mead v. Batchlor*, 435 Mich. 480, 490-491 (1990) see also *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). Civil commitment and quarantine implicate similar individual interests because both entail state-imposed non-criminal confinement to prevent a future risk to the public's well-being.

The U.S. Supreme Court has established three key requirements for civil commitment:

Individualized risk assessment

An individual risk assessment means that before a state may confine a person, it must make the determination that the particular individual presents a risk to the public. As Justice Souter has explained succinctly, "Due process calls for an individual determination before someone is locked away." *Demore v. Hyung Joon Kim*, 538 U.S. 510, 551 (2003).

"As quarantines constitute a major infringement of liberty, it would be unconstitutional to quarantine a generalized class of people absent a determination that the particular individual poses a public health risk. It is not enough, for example, that a person has tuberculosis; the state must also demonstrate that the individual will not voluntarily comply with treatment." *Best v. St. Vincents Hosp.*, 2003 U.S. Dist LEXIS 11354 (2003).

Least restrictive means

Curtailing a person's fundamental personal liberties, if justified by a sufficiently strong state interest, must be narrowly tailored. The Supreme Court has stated, "Even [when] the governmental purpose [is] legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The Court determined that "[a] statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law." *Covington v. Harris*, 419 F. 2d 617, 623 (1969).

Procedural due process

As the Supreme Court has stated plainly: "The Constitution requires some kind of a hearing before the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). Civil confinement is such an interest. See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Berger, C.J., concurring) ("There can be no doubt that involuntary commitment to a mental hospital, **like involuntary confinement of an individual for any reason**, is a deprivation of liberty which the State cannot accomplish without due process of law."). See also *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972).

In this case it's not only very clear that Governor Whitmer issued and continues to issue Executive Orders in direct violation of her Constitutional authority and Oath of Office, but that she also failed to meet any of the three basic standards established by the U.S. Supreme Court before ordering mass public confinement of every citizen of the Great State of Michigan.

The entire mismanagement of the COVID19 matter in Michigan has resulted in the complete and total deprivation of Natural Rights and Civil Liberties. It cannot be allowed to stand.

We have seen this before in the USA, in the unconstitutional overreach of government authority during the Ebola virus scare. Numerous State and Federal cases addressed those government overreaches of authority and here we are, addressing those same overreaches again today.

In the end, Centers for Disease Control and Prevention (CDC) set guidelines for states on preventing transmission of Ebola Virus Disease (EVD) using scientific evidence to calibrate risk. The agency recommended restricting the movement of individuals only to prevent genuine risks, using a tiered approach depending on the level of risk. **Because they recommend individualized risk assessment based on scientific evidence they comport with constitutional standards**. However, Governor Whitmer did not comport with constitutional standards. Instead, she failed all three standards established by the U.S. Supreme Court to prevent the unconstitutional abuses of government power during the Ebola scare.

Governor Whitmer's broad assaults on freedom and liberty are certainly not the "least restrictive means" she could have used to manage the alleged COVID19 crisis. In fact, she chose the most restrictive means available. Governor Whitmer did not comply with the constitutional standard of "individual risk assessment" to determine who should be quarantined and who shouldn't. She simply quarantined everyone and everything.

These Executive Orders and subsequent DNR rules lack any connection between the stated governmental goals and the substantial limitations on the Plaintiffs' fundamental rights. Under the Orders there is no distinction made between individuals infected with COVID-19 and those that are not, nor is there a distinction made between people who may have come into contact with COVID-19 and those who are highly unlikely to have contact with COVID-19. There is no distinction between regions of the state who have been impacted more by COVID-19 and those regions who have little or no impact. Like the Governor's Executive Orders, there is also no

connection offered between stifling the spread of COVID-19 and the DNR's restrictions on the use of public lands and waterways.

Plaintiffs have identified several other approaches that the Governor could have taken which would be less restrictive and achieve the same ends; most importantly, they utilized the already existing Department of Health system. Local Health Departments are authorized to implement procedures "relating to the discovery and care of an individual having or suspected of having a communicable disease" MCL 333.5115. The Law even defines a "Carrier" as an individual who serves as a potential source of infection and who harbors or who the department *reasonably believes* to harbor a specific infectious agent or a serious communicable disease or infection, whether or not there is present discernible disease. MCL 333.5201(1)(a) (emphasis added). The Law further lays out the process required to treat, voluntarily or involuntarily these carriers. MCL 333.2453. If a local health officer determines that control of an epidemic is necessary to protect the public health, the local health officer may issue an emergency order to prohibit the gathering of people and may establish procedures to be followed by persons, including a local governmental entity, during the epidemic to insure continuation of essential public health services and enforcement of health laws. MCL 333.2453(1). If a department representative or a local health officer knows or has *reasonable grounds* to believe that an individual has failed or refused to comply with a warning notice issued under section 5203, the department or local health department may petition the circuit court for the county of Ingham or for the county served by the local health department for an order, MCL 333.5205(1) which could, should there be clear and convincing evidence, require anything from attending an education program, to undergoing tests, impose a cease and desist order, or be quarantined. MCL 333.5205(6).

Despite this, the trial court took the position that it was essentially powerless to do anything. (**Exhibit 1** at page 9). The court said, "it is not for the courts to pass on the wisdom of the state action . . .." The court goes on to quote *Rock v. Carney*, 216 Mich 280, 283; 185 NW 798 (1921) with "Policies adopted by the legislative and executive branches of the state government are not submitted to this branch for approval as to their wisdom." However, the Plaintiffs are not challenging the wisdom of the Governor's action, they are challenging the scope of her actions and whether they abide by the three key requirements for civil commitment. And unlike the trial Court's opinion, "[t]he case must be determined by the application of cold rules of law." *Id.*

There is no better example of applying the cold rule of law, as the court should have done here, than what the U. S. Supreme Court held in *New York Times Co. v. United States*, 403 U.S. 713 (1971). In that case the court upheld the first amendment allowing classified information from the Pentagon to be published by the New York Times and the Washington Post despite the compelling governmental interest in preserving classified information which could risk national security.

The Due Process Clause of the Fourteenth Amendment provides that "[no] State [shall] deprive any person of life, liberty, or property, without due process of law . . .." US Const Am XIV. *City if Grand Rapids v. 2000 GMC Denali & Contents (In re 2000 GMC Denali & Contents)*, 316 Mich. App. 562, 573, 892 N.W.2d 388, 395 (2016). The Plaintiffs, as residents of Michigan and citizens of the United States, have always enjoyed the constitutional freedoms to travel between the several states and within the State of Michigan whether it be for pleasure or work, or for any reason at all. They have also always enjoyed the right to be free from infringement on these liberties without first being afforded their procedural and substantive due process rights. However, Under Governor Whitmer's Executive Orders and the DNR's rules, the Plaintiffs have been prevented from exercising their most fundamental rights and ordered into mandatory quarantine

without any reasonable connection between the restriction and the government's interest in slowing the spread of COVID-19.

The Court by not granting the Plaintiff's Preliminary Injunction committed clear error and an emergency review and remand with instruction to enter the preliminary injunction is warranted.

V. Did The Trial Court Commit Clear Error And Abuse Its Discretion When It Determined That There Would Be Harm To The Public Interest If The Preliminary Injunction Was Granted?

Plaintiffs-Appellants Say, "Yes."
Defendants-Appellees Say, "No."

The fourth factor in an analysis of a preliminary injunction is "the harm to the public interest if the injunction is issued." *Davis*, 296 Mich App at 613, quoting *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 660-661; 588 NW2d 133 (1998). However, this is not the analysis offered by the trial court. In its opinion, the trial court held that "entry of a preliminary injunction would be more detrimental to the public than it would to plaintiffs." (**Exhibit 1** at page 17). The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights. *Id.* at 655-656. In no sense of the term can "status quo" mean harboring the entire state's population in their homes for an indefinite amount of time.

The trial court asserts the opinion that Plaintiffs' rights are only infringed temporarily and that individuals who will die from the virus are impacted permanently. This might be a true statement, but it necessitates tunnel-vision. Governor Whitmer's Executive stay-at-home Orders first went into effect on March 24, 2020 and have been extended three times with no end in sight. These excessive orders have caused immense, potentially irreparable damage, to the State and people of Michigan. These Orders have caused the state's unemployment rate to reach 24% according to the latest numbers (see **Exhibit 17**) and it may in fact force the State of Michigan into

bankruptcy, along with millions of its citizens. Further, the Federal Reserve Chair, Jerome Powell is concerned about a prolonged recession. (See **Exhibit 18**). Of far greater concern however is the direct immediate threat to Michigan freedom, liberty and security caused by Government Whitmer's actions. No virus could ever do the damage done by unconstitutional government infringements on the Natural Rights and Civil Liberties of its citizens.

Further, just because an individual has the right to leave the house and travel as they please throughout the state, does not mean that someone who wishes to engage in "self-isolation" is not also free to do so. The question presented by the trial court was a balance between one individual's rights and societies, but the court missed the idea of allowing both. Just because one individual is free to leave the house does not necessitate the other to come into contact with him or her. Further, the Plaintiffs are not challenging the closure of schools, the 6-foot distance in public accommodations, the restrictions on entering nursing homes and hospitals, or any other reasonable restriction. If the Governor was forced to rescind her Stay-at-Home Executive Orders, all the other protective measures would remain, the Plaintiffs as well as all residents of Michigan would be allowed to travel and work free from infringements while still being able to protect themselves and others from COVID-19.

The Court by not granting the Plaintiff's Preliminary Injunction by holding that doing so would endanger the public committed clear error and abused its discretion therefore an emergency review and remand with instruction to enter the preliminary injunction is warranted.

VI. Did The Trial Court Commit Clear Error And Abuse Its Discretion When It Determined That The Emergency Management Act Was Constitutional And Did Not Grant Uncontrolled And Arbitrary Power To The Administration And Therefore Plaintiffs Were Not Likely To Succeed On Their Merits?

Plaintiffs-Appellants Say, "Yes."
Defendants-Appellees Say, "No."

The Plaintiffs in this matter challenge the constitutionality of the Emergency Management Act as it has been applied under the Governor's Executive Orders in response to COVID-19

When a law is contested in an as-applied challenge, the Plaintiffs are challenging the way in which the law is implemented and seeks to prevent similar conduct, but not necessarily to render the law utterly inoperative, *Ada v Guam Soc'y of Obstetricians and Gynecologists*, 506 U.S. 1011, 1012 (1992) meaning that claimant has alleged "'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014), quoting *Village of Euclid v Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

The Michigan Constitution makes it quite clear that the legislative power is vested in the Senate and the House of Representatives. Const 1963, art 4, § 1. The legislature cannot delegate its power to make a law. *Department of Natural Resources v. Seaman*, 396 Mich. 299, 308, 240 N.W.2d 206, 210 (1976). It can only make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. *Argo Oil Corp v Atwood*, 274 Mich 47, 52; 264 NW 285 (1935).

Governor Whitmer asserts her authority to issue these Executive Orders in part under MCL 10.31(1) and MCL 30.403. MCL 10.31(1) states in part: "the governor may promulgate "*reasonable*" orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." *Emphasis added.* However, acting under "color of law," Governor Whitmer has acted beyond her legal authority as Governor of Michigan.

The trail court often cited *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) in its opinion and order. This case was used to justify the position that it took under the due process challenges

but it also addresses a very important point on the constitutionality of the Governor's actions in relying on MCL 10.31(1) and MCL 30.403. The Jacobson Court held that after reviewing the law at issue in that case, It "observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a Board of Health, composed of persons residing in the locality affected and appointed, presumably, because of their fitness to determine such questions." *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). Neither MCL 10.31(1) nor MCL 30.403 confer the authority on to the Governor to assess a public health situation or take action in response.

A strict reading of the two statutes provide the governor only with the authority to act in response to the vague term "emergency". If the legislature had intended the Governor to act in the face of a public health situation, they would have put that in the statues. As noted above, the legislature has granted this authority to deal with public health issues to the Department of Health. There are dozens of laws establishing and authorizing the Department of Health, as enforced through its various local agencies, to develop procedures and standards allowing health officers to deal with this very issue. Local Health Departments are authorized to implement procedures "relating to the discovery and care of an individual having or suspected of having a communicable disease or a serious communicable disease or infection." MCL 333.5115. There is no such authorization for the Governor.

Yet in invoking these statutes, the Governor Whitmer signed multiple Executive Orders invoking COVID-19 and delegated which individuals are "essential", delegated which business

are "essential", quarantined the entire state's population to their homes, restricted individuals' right to travel, and restricted individuals' right to access public lands and waterways. All with no authority to do so.

In recent weeks the Governor even discarded MCL 30.403 (3) and (4) which requires her to seek legislative authority to go beyond 28 days and has effectively decided she will do whatever she wants. There are only two options here: (1) either the scope of MCL 10.31(1) and MCL 30.403 do not allow the Governor to run away with ultimate authority to unilaterally enact Executive Orders which have the same effect as legislation for an indefinite amount of time and by doing just that her actions are unconstitutional; or (2) MCL 10.31(1) and MCL 30.403 do allow the Governor to impose the Executive Orders she has and the law itself must be held unconstitutional. Either outcome warrants a remand.

In light of the above, the Trail Court by not granting the Plaintiffs' Preliminary Injunction by holding that Plaintiffs were not likely to succeed on their merits committed clear error and abused its discretion therefore an emergency review and remand with instruction to enter the preliminary injunction is warranted.

CONCLUSION AND RELIEF REQUESTED

The trial court committed several clear errors when deciding to deny Plaintiffs' request for a Preliminary Injunction. It failed to apply the appropriate legal principals, failed to recognize the right to intrastate travel as a fundamental right, and it failed to apply strict scrutiny to the Executive Orders at issue. These failures lead naturally to an abuse of discretion.

These Plaintiffs have had their constitutionally protected rights severely curtailed and or eliminated without any sort of due process. While this matter is pending on its merits, a preliminary injunction is warranted to preserve those rights and restore the status quo. Accordingly, Plaintiffs-

Appellants respectfully requests that the Court grant leave, reverse, and direct a Preliminary Injunction be entered. In the alternative, Plaintiffs request this Court remand this matter to the trial court with instructions to apply strict scrutiny to its analysis of the Governor's Executive Orders.

Respectfully submitted,

Date: May 15, 2020

/s/ *David C. Helm*

HELM LAW
By: DAVID C. HELM (P-75022)
Attorney for Plaintiffs-Appellants
598 N. Mill St.
Plymouth, MI 48170
(248) 679-8804
(248) 667-7802 fax
David@HelmLawPC.com

CERTIFICATE OF SERVICE

The undersigned certifies that the forgoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings

on May 15 20 20

By ☐ U.S. Mail ☐ Fax
☐ Hand Delivery ☐ Overnight Courier
☐ Certified Mail ☒ E-File Email as stipulated by counsels

Signature /s/ David C. Helm (P75022)